(4)

PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-01209 CFY
SHORT TITLE Catlett, Virgil R., et al. DOCKETED: Jan 25 1985
VERSUS United States

Date	Proceedings and Orders
Jan 17 1985	Application for extension of time to file petition and order granting same until January 28, 1985 (O'Connor, January 17, 1985).
Jan 25 1985	Petition for writ of certiorari filed.
Feb 15 1985	Order extending time to file response to petition until March 31, 1985.
Mar 27 1985	DISTRIBUTED. April 12, 1985
Mar 27 1985	Brief of respondent United States in opposition filed.
Apr 15 1985	REDISTRIBUTED. April 19, 1985
Apr 22 1985	REDISTRIBUTED. April 26, 1985
Apr 29 1985	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

84-1209

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VIRGIL RAYMOND CATLETT, III; FARRELL E. GOULART; RONALD C. GOULART; RONALD LEE GREGORY; ROBERT DEWEY HALE; GEORGE LEBRON HIGGINS; JOHNNY W. MASTERS; JOHN R. MELDORF; LEROY SIMMONS; GREGORY LEON SMITH; RONALD TALMADGE STANSELL; BOBBY TERRELL TUCKER; JACKIE R. BARKER,	ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
Petitioners,	
vs.	
UNITED STATES OF AMERICA,	
Respondent.	

PETITION FOR WRIT OF CERTIORARI - CRIMINAL CASE

Counsel for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is fundamentally just to convict hunters of hunting migratory birds over a baited field or by means of baiting where a court finds as fact that the hunters neither baited said field or knew that it was baited, nor was there present at the time of arrest any observable remnants of purposely placed feed, known as non-agricultural product.

2. Whether it is fundamentally just to convict hunters of hunting migratory birds over a baited field or by means of baiting where there is substantial evidence that non-agricultural product has been placed on a field with no intent to bait or to provide the arrested hunters a lure benefit therefrom and where said product has been removed before, and is not evident on, the day of the hunt.

PARTIES

The captions on the cover and page 1 contain the names of all parties.

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Statutes:

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VIRGIL RAYMOND CATLETT, III, et al,	)	
Petitioners,	)	ON APPEAL FROM THE UNITED STATES
vs.	)	COURT OF APPEALS FOR THE
UNITED STATES OF AMERICA,	)	SIXTH CIRCUIT
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

TO THE HONORABLE CHIEF JUSTICE, ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Virgil Raymond Catlett, III, and all others, set forth on the front of this Petition, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals entered in the above case on November 19, 1984.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is unreported but is included as Appendix A.

The Opinion of the District Court for the Eastern District of Tennessee is unreported but is included as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on November 19, 1984, and a copy thereof is appended to this Petition as Appendix A. An Order extending the time for filing this Petition was entered on January 17, 1985, and is appended to this Petition as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

TREATIES, STATUTES AND REGULATIONS APPLICABLE HERETO

The applicable sections of Title 16, United States Code, are as follows:

> § 703. Taking, killing, or possessing migratory birds unlawful.
>
> Unless and except as permitted by regulations made as hereinafter provided in Sections 703 to 711 of this title, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and

birds in danger of extinction, and their environment concluded March 4, 1972.

§ 704. Determination as to when and how migratory birds may be taken, killed or possessed.

Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

§ 707. Violations and penalties; forfeitures.

(a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of sections 703 to 711 of this title, or who shall violate or

fail to comply with any regulation made pursuant to said sections shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both.

(b) Whoever, in violation of sections 703 to 711 of this title, shall --

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

(c) All guns, traps, nets and other equipment, vessels, vehicles, and other means of transportation used by any person when engaged in pursuing, hunting, taking, trapping, ensnaring, capturing, killing, or attempting to take, capture, or kill any migratory bird in violation of sections 703 to 711 of this title with the intent to offer for sale, or sell, or offer for barter, or barter such bird in violation of said sections shall be forfeited to the United States and may be seized and held pending the prosecution of any person arrested for violating said sections and upon conviction for such violation, such forfeiture shall be adjudicated as a

> penalty in addition to any other provided for violation of said sections. Such forfeited property shall be disposed of and accounted for by, and under the authority of, the Secretary of the Interior.

The applicable portions of the pertinent Code of Federal Regulations, 50 CFR 20.1, et seq. (1983) is as follows:

> By the aid of baiting, or on or over any baited area. As used in this paragraph, "baiting" shall mean the placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds, a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them; and "baited area" means any area where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed whatsoever capable of luring, attracting, or enticing such birds is directly or indirectly placed, exposed, deposited, distributed, or scattered; and such area shall remain a baited area for 10 days following complete removal of all such corn, wheat or other grain, salt, or other feed.

STATEMENT OF THE CASE

Petitioners were convicted pursuant to 16 U.S.C. 703-711, the Migratory Bird Act.

With one exception not relevant to the legal issues presented in this Petition, the facts herein are undisputed. For several years, one Charles Thomas had leased from his father-in-law a large tract of land in rural Tennessee. At some time prior to the arrest of your Petitioners, Thomas leased a portion of said tract to the Scenic Land Hunting Club. Subsequent thereto, a dispute arose between Thomas and co-tenants of his father-in-law over the use of the entire tract. The dispute resulted in threats of violence by some of the co-tenants towards Thomas and the club, and threats of disruption of the activities of the club, which had made improvements on the property. To protect their leasehold interest with the advent of dove season, the club, through Mr. Thomas, employed one of your Petitioners,

Judge John Meldorf, to obtain a Restraining Order in State Court on August 23, 1982, to prevent the other co-tenants from coming upon or entering the club's leasehold interest in the disputed tract. Copies of said Order were posted about the disputed tract and the Sheriff of Bledsoe County, Tennessee and his Chief Deputy were present at the request of the club on the day of the arrest to ensure peace and prevent violations of the Restraining Order.

On August 26, 1982, agents of the Tennessee Game and Fish Commission were informed by an anonymous tipster that the subject field had been baited for hunting. On said date, agents of said Commission visited said field and found several piles of non-agricultural product which they concluded were bait, but found no one present. Non-agricultural product is grain placed upon an open field, as opposed to having been grown thereon. On September 1, 1982, agents of

said Commission, together with an agent of the United States Fish and Wildlife Service, visited the subject tract and found all but one of the piles removed, but again no one was present.

On September 4, 1982, agents of said Commission and said Service again visited the field. At that time, a hunt was in progress. Prior thereto, as said agents drove past the field, they were observed by the President of the Club, who recognized who they were and waved to them as they passed. About thirty minutes later, the agents returned and arrested your Petitioners. A search of the field at that time uncovered, as the Sixth Circuit found, ". . . at best . . . only traces" of non-agricultural product. The only true "pile" remaining had been covered by bushhogging and could only be found by one of the agents because he remembered where he had seen a pile prev-

iously. It was approximately twice the size of the agent's 3 x 5 identifying card, and was located in a wash at one corner of the field. The District Court found that pile was "mildewed and soft" indicating it was not fresh. The United States Magistrate, who originally tried the cause, found that on the day of the hunt, this old, mildewed, covered pile could not have been found by your Petitioners ". . . without certainly taking some rather lengthy searches." The Sixth Circuit, as did the District Court and the Magistrate before it, held that the subject field was baited on the day of the hunt, as a result of the 10-day rule and the existence of the single pile, but found that your Petitioners neither baited the subject field nor knew that it ever had been baited. The Sixth Circuit concluded that had its decision in this cause been of first impression, they would have decided the case dif-

ferently, but in light of two prior decisions they reluctantly affirmed the conviction of your Petitioners.

ARGUMENT

It is fundamentally unfair to convict a person of a crime, even a malem prohibitum offense such as this, when said persons were found not only to have not contributed to or known of the offensive condition leading to their arrest, but would not even have become aware of said offensive condition except by the most extraordinary means. To the extent that a technical violation of the statute occurred in this case, given the facts, it was fundamentally an abuse of the prosecutorial function to proceed to trial.

The subject field was 200 yards square, located in a rural isolated area of East Tennessee. Given its size and location, and given the lack of definition within the applicable Code of Federal Regulations as to what quantity of non-agricultural substance is sufficient to constitute "bait" within the meaning thereof, your Petitioners would

literally have needed a round-the-clock 4-man guard for ten days prior to the hunt just to have ensured that they were not hunting over a baited field on the day of their arrest. The very facts of this case show that, without guidance from this Court, enforcement of this Regulation can be applied reductio ad absurdum. Surely even the Sixth Circuit's own reluctance to follow stare decisis shows that this Court ought to grant this Petition and reconcile the differences between the holdings of this Circuit (U.S. v. Green, 571 F.2d 1 (1977)) and the Fourth Circuit (U.S. v. Jarman, 491 F.2d 764 (1974)) on the one hand and the Fifth Circuit (U.S. v. Delahoussaye, 573 F.2d 910 (1978)) and the Tenth Circuit (Allen v. Merovka, 382 F.2d 589 (1967)) on the other.

In Delahoussaye, appellants were hunting ducks from a duck blind about 300 yards from some live calling decoys and a pile of

cracked corn. After first upholding the finding that the appellants were close enough to the forbidden area to fall within the purview of Regulations identical to those herein, the Court reversed their conviction, holding at 912:

> ". . . a minimum, the bait or the callers must have been so situated that their presence could reasonably have been ascertained by a hunter properly wishing to check the area of his activity for illegal devices." (emphasis added).

The Fifth Circuit continued,

> "Any other interpretation would simply render criminal conviction an unavoidable occasional consequence of duck hunting and deny the sport to those such as, say, judges who might find such a consequence unacceptable."

In the instant case, two of your Petitioners were members of the Bench at the time of their arrest.

The Fifth Circuit properly refused to impose any stricter interpretation of the Regulations, ruling that hunters should

"resist the temptation to sail close to the wind."

In Allen, appellant land owners filed suit to prohibit game wardens from posting their land as baited, thus prohibiting hunting, merely because appellant's land was located next to a state game refuge that had been seeded with non-agricultural product for conservation purposes. In reversing the District Court and finding for the appellant land owners, the Tenth Circuit clearly found that hunting on appellant's land was enhanced by the actions of the Federal Game Wardens adjacent thereto. But the Tenth Circuit refused to equate the mere presence of non-agricultural product normally used as "bait" with "baiting" itself. That Court said at 591:

> "The prohibited 'hunting method' thus contemplates that hunting and feeding are in some way related and that the hunters are performing or have some part directly or indirectly in the

> baiting as it is done for their benefit. . . The acts of third parties totally independent of the acts of hunting should not be used to make illegal what otherwise is proper. The prohibited acts refer to those of the hunter, not to the independent and unrelated acts of others." (emphasis added).

Your petitioners respectfully suggest that the distinction made by the Sixth Circuit between hunting over a baited field and baiting a field is not necessary in the instant case. Having baited a field to lure doves is just as actionable as knowingly hunting a field baited to lure doves. It is important that this distinction be discarded from the Sixth Circuit's otherwise well-reasoned opinion, given the instant facts, because in so disregarding that distinction, the reluctance of the Sixth Circuit to affirm your Petitioners' conviction becomes even more understandable and their failure to reverse the District

Court even more unsupportable. This observation results in an even more compelling reason for this Court to adopt three minimal tests to enforcement of the Treaty, which will not weaken its enforcement but will protect your Petitioners and others similarly situated.

Quantity of Bait

This Court should set forth some minimal criteria for agents of the Interior Department to know whether a quantity of non-agricultural product is so minutely present and so difficult to find that it should not be considered "bait" within the meaning of the Regulations.

Scienter

If, on the day of the hunt, the non-agricultural product is of such minimal quantity and of such difficulty of observation that it is not obvious to hunters after a diligent but reasonable search, and if no

other facts known or subsequently discovered by the agents through their investigation would show the subject hunters knew of or participated in any placing of bait within the 10-day period prior to the investigated hunt, then the agents should be required to show some minimal level of scienter on the part of the hunters before prosecuting them. This requirement would not, however, prevent wardens from closing a field because of the presence of bait at the time of investigation or 10 days prior thereto.

A minimal level of scienter is not inherently antithetical to the Sixth Circuit's opinion for in the case of a dispute over the definition of bait which centered on the agricultural versus the non-agricultural distinction of the applicable Regulation, the Sixth Circuit recognized scienter as an element of an alleged violation of the Treaty in U.S. v. Brandt, (717 F.2d 955 (1983)):

Your Petitioners suggest that with facts similar to the instant case, the minimum form of scienter, the "should have known" doctrine, should be a necessary element of the criminal offense.

Relationship Between the Presence of Non-Agricultural Product and the Hunters

The presence of non-agricultural product on a field, properly and necessarily prohibited by the afore-referenced Regulation, presumes the following:

> Anticipated Hunting, in this case of mourning doves
>
> Placement of product to lure said doves for hunting
>
> The hunting of said doves by use of the lure.

The third element of the proposed minimal test is that there be some beneficial relationship between the presence of the product and the hunting of migratory fowl. Where the hunters can show that not only have they met the first two prongs of the

proposed test, but also that the product may have been placed on the field by unknown persons for proveably non-hunting purposes, such fact should also be considered by a Court in determining the guilt or innocence of the accused hunters.

Quite simply, the third element of the proposed test addresses the definition of bait. Bait is defined as a "lure, attraction, or enticement" by the afore-referenced Regulation. In the instant cause, the suspect piles were placed in willful violation of a lawful Restraining Order of a State Court by persons other than your Petitioners for the purpose of entrapping the Petitioners and not to lure protected migratory birds. The Regulations do not outlaw the presence of grain on a field; they only ban the placement of grain as a lure for the fowl. Not being a lure, the piles found by the agents in this case did not constitute

"bait" within the meaning of the Regulations and your Petitioners ought to have been entitled to prove such in their defense. In the instant case, the proof was unequivocal that the hunt had been very poor on the day of the arrest.

Practical Consideration of Such Test

Your Petitioners assert that arrests for hunting by baiting or over a baited field generally occur one of two ways -- after a stake-out or during a spot check. Arrest resulting from the latter would not be affected by this proposed test. Arrest resulting from the former would be somewhat affected but only in highly unusual circumstances as in the instant case.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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(Signed by Robert D. Hale by permission of Ronald C. Goulart)

CERTIFICATE OF SERVICE

I, MARK T. YOUNG, a member of the Bar of this Court, do certify that I have served a copy of this Petition for Writ of Certiorari by placing three copies of same in first class mail with sufficient postage thereon to the Solicitor General, Department of Justice, Washington, D.C. 20530, on the 25th day of January, 1985.

MARK T. YOUNG

A P P E N D I X

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-5249

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VIRGIL RAYMOND CATLETT, III; FARRELL E. GOULART; RONALD C. GOULART; RONALD LEE GREGORY; ROBERT DEWEY HALE; GEORGE LEBRON HIGGINS; JOHNNY W. MASTERS; JOHN R. MELDORF; LEROY SIMMONS; GREGORY LEON SMITH; RONALD TALMADGE STANSELL; BOBBY TERRELL TUCKER; JACKIE R. BARKER,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed November 19, 1984

Before: KRUPANSKY and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

I.

PER CURIAM. Defendants were convicted and fined in federal district court for violating The Migratory Bird Treaty, 16 U.S.C. §§ 703-711, and they appeal these convictions.

On August 26, 1982, agents of the Tennessee Wildlife Service, informed by an anonymous tipster, entered a field in Bledsoe County, Tennessee, and discovered it to be "baited" with piles of cracked corn and wheat in different locations. On September 4, 1982, less than ten days later, state and federal agents again went to the field and discovered a dove hunt in progress. They cited defendants for hunting migratory birds on a baited field, in violation of federal statute and regulations promulgated thereunder.

On the day of the hunt, there was very little "bait" still present in the field. There was testimony that there were two or three places where bait had been, but, at best there were only traces of the bait left.[1] The only true pile of bait existing on the field was a pile which was allegedly covered by recent "bush-hogging." The unfortunate defendants were apparently unaware of, and had not participated in, the baiting of the field.

The Scenic Land Hunting Club (the "Club") had rented the tract of land and field at issue from one Charles G. Thomas. Evidently, the ownership of this land was contested by other individuals. As a result of this contest, the Club took legal action and through the efforts of its attorney, John R. Meldorf, also a defendant, obtained a restraining order[2] prohibiting those other individuals from entering upon the land, or threatening to interfere with its use for hunting. Ironically, according to defendants, on the day of the hunt the Sheriff of Bledsoe County and his deputy were requested by the Club to be present at the field to enforce the order in the event any trouble occurred resulting from the issuance of the restraining order. Also, defendants posted copies of the order at various points around the hunting area in an effort to avoid any problems.

There was in fact no evidence introduced at trial tending to show that any of the defendants either baited the field, or knew that it was baited at any time. The question presented, therefore, is whether individuals who are without knowledge that a field has been baited may still be found criminally liable under 16 U.S.C. §§ 703-711.

[1] On September 1, 1982, bait was observed still to be on the field.

[2] Meldorf, according to defendants' brief, at the time of the hunt was only a "guest of the Club in recognition of his obtaining the restraining order." Also, Meldorf "was so unfamiliar with the [field] that he drove past [it] three times before he found it." *See* Brief for Defendants-Appellants at 7. Thus, we are presented here with a different kind of "attorney's fee" question.

II.

Section 703 of Title 16 makes it unlawful for any person, "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, . . . any migratory bird." 16 U.S.C. § 703. That same statute allows for exceptions to this general proscription to be prescribed by the Secretary of the Interior. Pursuant to this delegated power, the Secretary has promulgated regulations allowing the taking of migratory birds only in a very limited and specific manner. *See* 50 C.F.R. § 20.1 (1983). One of the restrictions laid down by the Secretary is that migratory birds may not be taken:

> By the *aid of baiting*, or *on or over any baited area*. As used in this paragraph, *"baiting"* shall mean the placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds, a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them; and *"baited area"* means any area where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed whatsoever capable of luring, attracting, or enticing such

> birds is directly or indirectly placed, exposed, deposited, distributed, or scattered; and such area shall remain a baited area for 10 days following complete removal of all such corn, wheat or other grain, salt, or other feed.

50 C.F.R. § 20.21(i) (emphasis added).

Therefore, this regulation effectively proscribes two different kinds of conduct; (1) taking migratory birds "by aid of baiting," and (2) taking migratory birds "on or over any baited area." *See United States* v. *Bryson*, 414 F. Supp. 1068, 1072 (D. Del. 1976). The penalty set out by Congress is a fine of not more than $500, or imprisonment for not more than six months. 16 U.S.C. § 706. In the present case, appellants have been charged and convicted only under the latter offense, taking migratory birds on or over a baited field.

There was direct testimony to the effect that on August 26, 1982 (nine days prior to the hunt) the field was baited. Under the definition of "baited field," *see* 50 C.F.R. § 20.21(i), this field was therefore baited on September 4, 1982, the day of the hunt.[3] The majority view, and the view of this circuit, is that there need be no showing that the defendants actually baited the field, or that they even knew it was baited; rather the crime is a strict liability offense. In *United States* v. *Green*, 571 F.2d 1, 2 (6th Cir. 1977), this circuit held that 50 C.F.R. § 20.21(i) does "not require proof of knowledge." (Citation omitted). This was subsequently reaffirmed in *United States* v. *Brandt*, 717 F.2d 955, 958 n.3 (6th Cir. 1983). In *Brandt*, although the court was dealing with a somewhat different issue,[4] it was stated:

[3] Appellants also contest the sufficiency of the evidence tending to show bait on the field the day of the hunt. They concede, however, the fact that bait was on the field just nine days prior thereto. Under the regulations adopted by the Secretary, there need be no bait on the field on the day of the hunt. 50 C.F.R. § 20.21(i).

[4] The court was addressing 50 C.F.R. § 20.21(i) (2), a proviso that allows taking migratory birds over land that is of "*bona fide* agricultural operations." The court unanimously upheld the validity of the

> The hunter is therefore placed in a precarious position . . . . A subjectively "innocent" person can unwittingly run afoul of the regulation. However, this is inherent in all so called "public welfare offenses" wherein scienter is not an element of the offense and these types of offenses have long been sanctioned by the courts.

Id. at 958 (footnote omitted).

The Sixth Circuit is not alone in this view. *See, e.g., United States* v. *Jarman*, 491 F.2d 764 (4th Cir. 1974). We find that only *United States* v. *Delahoussaye*, 573 F.2d 910 (5th Cir. 1978), has taken a different approach. In *Delahussaye*, to establish a violation under 16 U.S.C. §§ 703-711, a minimum of scienter was required to be proven. The court concluded that a "reason to know" that the field has been baited must be demonstrated, stating:

> Any other interpretation would simply render criminal conviction an unavoidable occasional consequence of duck hunting and deny the sport to those such as, say, judges who might find such a consequence unacceptable. On the other hand, to require a higher form of scienter – actual guilty knowledge – would render the regulations very hard to enforce and would remove all incentive for the hunter to clear the area, a precaution which can reasonably be required. Such a reading is unnecessary to the regulations' constitutionality, and we reject it.

Id. at 912-13.

Were we writing with a clean slate, this reasoning would be appealing, but this view was expressly rejected in *Brandt*, 717 F.2d at 958 n.3. We also rejected in *Green* any argument that

statute and its strict liability nature, ruling that when taking migratory birds over a field supposedly seeded for agricultural purposes, the intent of the party doing the seeding is relevant as to whether it was for agricultural purposes. This does *not* affect the strict liability nature of the offense in regard to the hunter.

there must be proof that the baiting was done for the hunters' benefit. 571 F.2d at 2. The law is, unhappily for defendants, established that scienter is not required for a conviction.[5] We concede that it is a harsh rule and trust that prosecution will take place in the exercise of sound discretion only. It is for Congress and the Secretary of the Interior to establish and change the policies here involved.

III.

We reluctantly in this case must AFFIRM the decision of the district court.

---

[5] Appellants' final argument that the regulations are unreasonable in light of congressional intent is unavailing. The Secretary was given plenary power to allow the taking of migratory birds, which is otherwise *wholly unlawful*. We are not prepared to say the Secretary's regulations are arbitrary or constitute a "clear error in judgment." *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); 5 U.S.C. § 706(2)(A). Rather, the regulations are entitled to a "presumption of regularity." *See National Rifle Association of America, Inc.* v. *Kleppe*, 425 F. Supp. 1101, 1111 (D.D.C. 1976), *aff'd*, 571 F.2d 674 (D.C. Cir. 1978).

United States Court of Appeals

FILED

FOR THE SIXTH CIRCUIT

NOV 19 1984

No. 84-5249

JOHN P. HEHMAN,

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VIRGIL RAYMOND CATLETT, III, et al.,
Defendants-Appellants.

fore: KRUPANSKY and WELLFORD, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

J U D G M E N T

ON APPEAL from the United States District Court for the tern District of Tennessee.

THIS CAUSE came on to be heard on the record from the said trict Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged this court that the judgment of the said District Court in this case and the same is hereby affirmed.

No costs taxed.

FILED DEC 14 1984 DAVID A. EARLEY, JR. Clerk

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

John P. Hehman
Clerk

ued as Mandate: DECEMBER 11, 1984

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Total.....$

A True Copy.

Attest:

Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

VIRGIL RAYMOND CATLETT, III,	)	NO. 82-0099M
FARRELL E. GOULART,	)	NO. 82-0100M
RONALD C. GOULART,	)	NO. 82-0101M
RONALD LEE GREGORY,	)	NO. 82-0102M
ROBERT DEWEY HALE,	)	NO. 82-0103M
GEORGE LEBRON HIGGINS,	)	NO. 82-0105M
JOHNNY W. MASTERS,	)	NO. 82-0108M
JOHN R. MELDORF,	)	NO. 82-0110M
LEROY SIMMONS,	)	NO. 82-0113M
GREGORY LEON SMITH,	)	NO. 82-0116M
RONALD TALMADGE STANSELL,	)	NO. 82-0117M
BOBBY TERRELL TUCKER,	)	NO. 82-0119M
JACKIE R. BARKER,	)	NO. 82-0150M
	)	
Appellants,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

OPINION

The defendants in this case were found guilty of violating the provisions of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711, a misdemeanor, id., § 707, and were fined $50.00 each. The trial was conducted before the Honorable Roger W. Dickson, United States

Magistrate, sitting without a jury, pursuant to 18 U.S.C. § 3401(a) and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates. The defendants timely filed their notice of appeal, id., Rule 7(b), and the cases were consolidated for disposition on appeal.

I. STATUTORY FRAMEWORK

The defendants were charged with and found guilty of taking or attempting to take migratory game birds (specifically, mourning doves) by the aid of, and/or over a baited area. The Migratory Bird Treaty Act, as applied to these defendants, starts with the basic proposition that it is unlawful to take or attempt to take migratory game birds, except as specifically authorized by regulations promulgated by the Secretary of the Interior. 16 U.S.C. § 703. The Secretary is specifically authorized to promulgate such regulations by section 704. Section

707 makes it a misdemeanor to violate 16 U.S.C. §§ 703-711, or "any regulation made pursuant to said sections ...."

In response to this grant of authority, the Secretary of the Interior has promulgated regulations implementing the Act. See 50 C.F.R. § 10.1. There is no dispute that mourning doves are included within the regulations, id., §§ 10.12, 10.13 and 20.11, just as there is no dispute that when these defendants were arrested they were attempting to "take" mourning doves. "Take," as defined in the regulations

> ...means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.

Id., § 10.12. The dispute comes on the issues whether the defendants were taking or attempting to take mourning doves by a proscribed method.

> Migratory birds on which open seasons are prescribed in this part

may be taken by any method except those prohibited in this section. No person shall take migratory game birds:

* * *

(j) By the aid of baiting, or on or over any baited area. As used in this paragraph, "baiting" shall mean the placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them; and "baited area" means any area where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed whatsoever capable of luring, attracting, or enticing such birds is directly or indirectly placed, exposed, deposited, distributed, or scattered; and such area shall remain a baited area for 10 days following complete removal of all such corn, wheat or other grain, salt, or other feed. However, nothing in this paragraph shall prohibit:

(1) The taking of all migratory game birds, including waterfowl, on or over standing crops, flooded standing crops (including aquatics), flooded harvested croplands, grain crops properly shocked in the field where grown, or grains found scattered solely as the result of normal agricultural planting or harvesting; and

(2) The taking of all migratory game birds, except waterfowl, on or over any lands where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed has been distributed or scattered as the result of bona fide agricultural operations or procedures, or as a result of manipulation of a crop or other feed on the land where grown for wildlife management purposes: Provided, That manipulation for wildlife management purposes does not include the distributing or scattering of grain or other feed once it has been removed from or stored on the field where grown....

Id., § 20.21.

FACTS

Early in August of 1982, Tommy Lee Stanfill, an assistant supervisor of the Tennessee Wildlife Resources Agency, received information from his agency's office in Crossville, Tennessee, that they had been told by an unidentified source that a field in Bledsoe County had been baited for doves. Acting on this information, Stanfill and Officer Jim Evans went to the field at 8:00 on the evening of August 26, 1982.[1] Even though it was dark at the time, by the use of

a flashlight Stanfill and Evans found six or eight piles of bait, which comprised wheat, corn, and millet. The bait was scattered in random locations over the field, which was approximately 150-200 yards square, but, according to Stanfill, could have been seen by a hunter walking over the field.

The field inspected by Stanfill and Evans borders a secondary road in Bledsoe County, Tennessee. The particular tract of land, about five acres, was being leased by the Scenic Land Hunting Club[2] from Charlie Thomas. Mr. Thomas apparently manages the land for the legal owners, who are approximately twenty heirs of the Pitts family. According to the evidence, the relationship between Thomas and the Pitts heirs is not entirely amicable. In fact, it may fairly be concluded that the heirs were disturbed by the fact that a hunting club was the lessee of the tract of land; so much so, in fact, that Thomas employed legal counsel to obtain a restraining order to

keep the heirs and other descendants from going on the land.

At the time the field was first inspected by Stanfill (August 26), it was covered with weeds and millet, and part of the field near a small cabin used by the club as a clubhouse, had a few rows of standing corn. On Friday, August 27, 1982, Leroy Simmons, the president of the club, mowed the entire property, including the small garden where the corn was growing. This was done, it seems, to prepare the field for the opening of dove season on September 1, 1982.

On the day the season opened, Stanfill and other officers of the state agency and of the United States Fish and Wildlife Service returned to the field. Nothing much was accomplished because the field was not being hunted. Special Agent Wright did testify, however, that he inspected the field, now mown, through binoculars, and was able to identify bait on the field.

On September 4, 1982, the club conducted a dove hunt on the field, beginning around noon. At approximately three o'clock, the federal and state wildlife officers arrived and issued citations for all the hunters for hunting on a baited field. Upon being asked to identify the location of the bait, the officers, with some difficulty, were able to locate three or four piles of bait. One of the largest piles found on August 26th had apparently been removed, as Stanfill had to dig in the ground underneath where the pile had been to find a small amount of grain. Also found was some grain that had apparently been washed into a small gully by the heavy rain. This grain was mildewed and soft, while Stanfill testified that the grain he found on August 26th was fresh and hard.

All of the defendants testified that none of them saw any bait on the field on September 4th, even though all had walked the field.

III. THE DECISION BELOW

At the conclusion of the evidence, the Magistrate found the field had been baited on August 26th, and on September 4th. He held that under the law in this circuit, particularly United States v. Green, 571 F.2d 1 (6th Cir. 1977), the fact that the defendants did not bait the field and, in fact, did not know the field was baited was irrelevant. Since there was no dispute that the defendants were hunting the field, the finding that the defendants had violated the regulations naturally followed. The Magistrate further held that while scienter was not an element of the offense, it was a factor to be considered in imposing punishment. He therefore fined each defendant $50.00, as noted above.

IV. DISCUSSION

The defendants have raised five issues on appeal. The Court will address each of these issues in turn.

A.

Defendants first argue that the charges should have been dismissed because of the government's failure to prove either that the defendants knew or reasonably should have known that the field had been baited, or that the baiting was done by or with the knowledge and permission of the defendants for the benefit of the defendants. (Brief of Appellants, at p. 3). Although defendants have split this into two separate issues, since the resolution of each depends upon whether some form of scienter is an element of the offense, the issues as stated by the defendants will be treated as one.

The defendants contend that this Court should hold in accordance with other circuits, see United States v. Delahoussaye, 573 F2d 910 (5th Cir. 1978); Allen v. Merovka, 382 F.2d 589 (10th Cir. 1967), that some form of scienter must be shown in order for a conviction to be proper under the Act. This Court

is simply not free to hold as defendants wish. The Sixth Circuit held in United States v. Green, 571 F.2d 1 (6th Cir. 1977), that scienter is not an element of an offense under the regulation. This holding was recently reaffirmed in United States v. Brandt, 717 F.2d 955, 958-59 & n. 3 (6th Cir. 1983). It is thus clear that in this circuit scienter need not be proven, as the Magistrate correctly held.

B.

The defendants next argue that in going on the field and taking samples of bait, which were later introduced into evidence, the agents violated the defendants' right under the Fourth Amendment to be free from unreasonable searches and seizures. In support of this contention, the defendants argue that the clubhouse near the field was a dwelling house, and that the field was within the curtilage of the building. This would mean, of course,

that the open field doctrine, see Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924); United States v. Oliver, 686 F.2d 356 (6th Cir. 1982), would not apply. Further, this would mean that the search was likely unreasonable because of the agents' failure to obtain a warrant.

It is undisputably clear, however, that the defendants' argument is not supported by the facts. First, the clubhouse is not a dwelling, without which there can be no curtilage at all. See Case v. United States, 231 F.2d 22 (10th Cir. 1956). The mere fact that the field was fenced, see Janney v. United States, 206 F.2d 601 (4th Cir. 1953), and near a building is not enough to give rise to a reasonable expectation of privacy in a field. See Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Even if the curtilage doctrine were to be applied, it is clear from the evidence that this field would not fall within it.

> Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.

United States v. Case, supra. Any analysis of the facts in this case under this standard leads ineluctably to the conclusion that this field was not within the curtilage of the building. The Magistrate was correct in ruling that there had been no fourth amendment violation here.

C.

The defendants next argue that to convict them of violating an administrative regulation violates the fifth amendment. This assertion borders on the frivolous. Congress by statute provided that it was unlawful to take migratory birds except as permitted by regulation. 16 U.S.C. §703. The Secretary of the Interior was expressly empowered to promulgate such regulations. Id., § 707. There is simply no basis to argue,

as have the defendants, that defendants were convicted of violating an administratively-imposed regulation rather than a legislatively-enacted statute. The regulation sets the standard of conduct, which is enforced by statute. This issue has no merit.

D.

Finally, defendants argue that the evidence does not support a finding of guilt beyond a reasonable doubt. The Magistrate found that the proof was sufficient, and under Rule 7(e), the Court is of the opinion that the Magistrate's finding is not clearly erroneous.

V. CONCLUSION

Having considered the issues raised by the defendants, the judgment of the Magistrate is hereby affirmed.

An appropriate Order will enter.

/s/ H. TED MILBURN
UNITED STATES DISTRICT JUDGE

Filed March 5, 1984.

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[1]Stanfill testified that the delay of 2-3 weeks between the receipt of the information and his going to the field was caused by heavy rainfall in the area.

[2]The defendants are members of the Scenic Land Hunting Club.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

VIRGIL RAYMOND CATLETT, III,	)	NO. 82-0099M
FARRELL E. GOULART,	)	NO. 82-0100M
RONALD C. GOULART,	)	NO. 82-0101M
RONALD LEE GREGORY,	)	NO. 82-0102M
ROBERT DEWEY HALE,	)	NO. 82-0103M
GEORGE LEBRON HIGGINS,	)	NO. 82-0105M
JOHNNY W. MASTERS,	)	NO. 82-0108M
JOHN R. MELDORF,	)	NO. 82-0110M
LEROY SIMMONS,	)	NO. 82-0113M
GREGORY LEON SMITH,	)	NO. 82-0116M
RONALD TALMADGE STANSELL,	)	NO. 82-0117M
BOBBY TERRELL TUCKER,	)	NO. 82-0119M
JACKIE R. BARKER,	)	NO. 82-0150M
	)	
Appellants,	)	
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

ORDER AND JUDGMENT

In accordance with the Opinion filed herewith, it is ORDERED that the judgment of conviction should be and it hereby is AFFIRMED.

ENTER:

UNITED STATES DISTRICT JUDGE

APPENDIX C

In The
SUPREME COURT OF THE UNITED STATES
NO. A-552

VIRGIL RAYMOND CATLETT, III, et al

Petitioners,

versus

UNITED STATES OF AMERICA

Respondent.

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

Upon the consideration of the application of counsel for Petitioner(s),

It is ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 28, 1985.

/s/ SANDRA D. O'CONNOR

ASSOCIATE JUSTICE OF
THE SUPREME COURT OF
THE UNITED STATES

Dated this 17th day of January, 1985.

(2)

No. 84-1209

In the Supreme Court of the United States

OCTOBER TERM, 1984

VIRGIL RAYMOND CATLETT, III, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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Assistant Attorney General

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QUESTION PRESENTED

Whether scienter is a necessary element of an offense under Section 2 of the Migratory Bird Treaty Act, 16 U.S.C. 703, which provides that "[u]nless and except as permitted by regulations * * *, it shall be unlawful * * * to pursue, hunt, take, capture, kill, attempt to take, capture, or kill * * * any migratory bird * * *," and 50 C.F.R. 20.21(i), which implements the Act by providing that "[n]o person shall take migratory game birds * * * on or over any baited area."

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1209

VIRGIL RAYMOND CATLETT, III, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) and the opinion of the district court (Pet. App. A8-A22) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7) was entered on November 19, 1984. On January 17, 1985, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 28, 1985. The petition was filed on January 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

1. Section 2 of the Migratory Bird Treaty Act, 16 U.S.C. 703, provides in pertinent part:

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, * * * any migratory bird * * * included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.

2. The implementing regulation at issue, 50 C.F.R. 20.21, provides in pertinent part:

Migratory birds on which open seasons are prescribed in this part may be taken by any method except those prohibited in this section. No person shall take migratory game birds:

* * * * *

(i) By the aid of baiting, or on or over any baited area. As used in this paragraph, "baiting" shall mean the placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them; and "baited area" means any area where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed whatsoever capable of luring, attracting, or enticing such birds is directly or indirectly placed, exposed, deposited, distributed, or scattered; and such

area shall remain a baited area for 10 days following complete removal of all such corn, wheat or other grain, salt, or other feed.

STATEMENT

Except as permitted by regulations, the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, makes it unlawful for any person, "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill * * * any migratory bird." 16 U.S.C. 703. Section 6(a) of the Migratory Bird Treaty Act, 16 U.S.C. 707(a), provides that "any person * * * who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both." Petitioners were tried before a United States Magistrate, found guilty of taking or attempting to take migratory game birds "on or over any baited area," in violation of 50 C.F.R. 20.21(i), and fined $50 each (Pet. App. A8).

On appeal to the district court, petitioners argued that the charges should have been dismissed because there was no proof that petitioners knew or reasonably should have known that the field had been baited (Pet. App. A17).[1] The

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[1]On August 26, 1982, agents of the Tennessee Wildlife Service inspected a field located in Bledsoe County, Tennessee, and found several piles of bait comprised of wheat, corn, and millet (Pet. App. A2). On September 4, 1982, less then ten days later, state and federal agents cited petitioners for hunting migratory birds on a baited field (*ibid.*). The agents were able to locate piles of bait on that date only "with some difficulty" (Pet. App. A15). All petitioners testified that none of them saw any bait on the field (*ibid.*). Under 50 C.F.R. 20.21(i), a field remains a "baited area" for ten days following complete removal of the bait. The reason for the rule is that the attraction of bait remains even after removal. See *United States* v. *Jarman*, 491 F.2d 764, 766 n.4 (4th Cir. 1974). The rule also prevents hunters from baiting a field before the season begins in order to create an attraction for the birds after the

district court rejected the argument (*id.* at A17-A18). Following *United States* v. *Brandt*, 717 F.2d 955, 958-959 (6th Cir. 1983), and *United States* v. *Green*, 571 F.2d 1, 2 (6th Cir. 1977), the court held that scienter is not an element of the offense charged under the regulation.[2]

The court of appeals affirmed the misdemeanor convictions (Pet. App. A1-A6). Although it observed that "[t]he unfortunate [petitioners] were apparently unaware of, and had not participated in, the baiting of the field" (*id.* at A2), the court, quoting *United States* v. *Green*, 571 F.2d at 2, held that 50 C.F.R. 20.21(i) "does 'not require proof of knowledge' " (Pet. App. A4). The court further noted (*ibid.*) that the view that scienter is not required for a conviction for hunting migratory birds over a baited area is the majority view. The court acknowledged (*id.* at A5) that the United States Court of Appeals for the Fifth Circuit, in *United States* v. *Delahoussaye*, 573 F.2d 910, 912 (1978), held "that a minimum form of scienter—the 'should have known' form—is a necessary element of the offense." Although the court of appeals found the reasoning in *Delahoussaye* to be "appealing," it also noted that the Sixth Circuit, in *United States* v. *Brandt*, 717 F.2d at 958 n.3, had previously declined to follow *Delahoussaye* (Pet. App. A5).

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season has opened. See *Koop* v. *United States*, 296 F.2d 53, 56-58 (8th Cir. 1961) (attraction for ducks continued for at least four days after baiting ceased).

[2]Petitioners also argued that the evidence did not support a finding of guilt beyond a reasonable doubt, that the state and federal agents violated the Fourth Amendment by entering the field and taking samples of the bait, and that their convictions for violating an administrative regulation contravened the Fifth Amendment. The district court rejected each argument (Pet. App. A18-A21), and the court of appeals also rejected challenges to the sufficiency of the evidence (*id.* at A4 n.3) and to the validity of the regulation (*id.* at A6 n.5). Petitioners have not raised these arguments in this Court.

ARGUMENT

The decision of the court of appeals is correct. Although there is a conflict among the circuits on the issue whether scienter is an element of an offense under 50 C.F.R. 20.21(i), we do not believe that review by this Court is necessary at this time.

1. Petitioners contend (Pet. 12) that it was "fundamentally unfair" to find them guilty of taking or attempting to take migratory game birds "on or over any baited area" because there was no proof that petitioners knew or reasonably should have known that the field had been baited. Petitioners urge this Court (Pet. 17-19) to interpret 50 C.F.R. 20.21(i) as requiring a minimal level of scienter, *i.e.*, that the hunter should have known that the field in question was baited.

Petitioners do not contend, however, that Congress cannot provide for strict liability criminal offenses. In *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 70 (1910), this Court held that "public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." When Congress exercises its regulatory powers for the public welfare, particularly in areas not known to the common law, see *Morissette* v. *United States*, 342 U.S. 246, 250-256 (1952), it may for the purpose of achieving some social good make criminal actions that are taken with no awareness of wrongdoing. See, *e.g.*, *United States* v. *Park*, 421 U.S. 658, 670-673 (1975) (unsanitary storage of food for sale); *United States* v. *Freed*, 401 U.S. 601, 607 (1971) (possession of unregistered firearm); *United States* v. *Dotterweich*, 320 U.S. 277, 280-281 (1943) (shipment of adulterated and misbranded drugs in interstate commerce); *United States* v. *Behrman*, 258 U.S. 280 (1922) (sale of narcotic substance). Whether scienter is an element of a

statutory crime is a question of legislative intent. *United States* v. *Balint,* 258 U.S. 250, 251-252 (1922).

2. In *North Dakota* v. *United States,* 460 U.S. 300, 309-310 (1983) (footnote omitted), this Court reaffirmed that the purpose of the Migratory Bird Treaty Act is to protect a matter important to the public welfare:

> The protection of migratory birds has long been recognized as "a national interest of very nearly the first magnitude." *Missouri* v. *Holland,* 252 U.S. 416, 435 (1920). Since the turn of the century, the Secretaries of Agriculture and of the Interior successively have been charged with responsibility for the "preservation, distribution, introduction, and restoration of game birds and other wild birds." Act of May 25, 1900, 31 Stat. 187, 16 U.S.C. § 701. A series of treaties dating back to 1916 obligates the United States to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats.

The wording of 16 U.S.C. 703 has remained the same since passage of the Migratory Bird Treaty Act in 1918. From the earliest cases, it has been held that the government need not prove that a defendant violated the Act's provisions with either guilty knowledge or specific intent to commit the violation. In *United States* v. *Schultze,* 28 F. Supp. 234, 236 (W.D. Ky. 1939), the district court, noting that the statute fails to use the word "willfully" or the word "knowingly," or any similar phrase, concluded that Congress did not intend to make scienter an element of an offense under 16 U.S.C. 703:

> In view of the broad wording of the act, and the evident purpose behind the treaty and the act, this Court is of the opinion that it was not the intention of Congress to require any guilty knowledge or intent to complete the commission of the offense * * *. The beneficial

> purpose of the treaty and the act would be largely nullified if it was necessary on the part of the government to prove the existence of scienter on the part of defendants accused of violating the provisions of the act.[3]

See also *United States* v. *Reese,* 27 F. Supp. 833, 834 (W.D. Tenn. 1939) ("Nowhere in the statute, or in the regulations promulgated pursuant thereto, will be found, either in express language or by necessary implication, any requirement of averment or proof of scienter to constitute a punishable violation of the statutory offense charged."). The district court in *Reese* supported its holding that Congress did not make scienter an element of the offense by noting that the penalty imposed is neither harsh nor severe and is within the discretion of the trial judge. *Id.* at 835. The court also held that Congress could not have intended to place upon the government "the extreme difficulty of proving guilty knowledge of bird baiting" in light of Congress's clear purpose "to make real the protection against the holocaustic slaughter of migratory birds" (*ibid.*).[4]

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[3]The underlying facts in *Schultze* are strikingly similar to the facts of this case. The defendants in *Schultze* contended that, inasmuch as they did not place the bait in the field in question, and did not know that the field was baited at the time of the hunt, their acts should not be deemed to have constituted a violation of 16 U.S.C. 703 and of the earlier regulatory version of 50 C.F.R. 20.21(i). *United States* v. *Schultze,* 28 F. Supp. at 235.

[4]The conclusion that scienter is not an element of the offense also is supported by the fact that several bills have been introduced in Congress to incorporate the element of scienter. See, *e.g.,* H.R. 14310, 90th Cong., 1st Sess. (1967); H.R. 15088, 90th Cong., 2d Sess. (1968); H.R. 567, 93d Cong., 1st Sess. (1973); and H.R. 1516, 94th Cong., 1st Sess. (1975). In 1973, hearings were held on unsuccessful legislation expressly "designed to put an end to the innocent hunter being arrested for hunting migratory waterfowl over a baited field." *Fish and Wildlife Miscellaneous—Part 2: Duck Baiting—Arkansas Land Conservation:*

3. As noted by the court of appeals (Pet. App. A4-A5), the majority view among the circuits is that there need be no showing that violators baited the field or that they knew it was baited. See *United States* v. *Chandler*, 753 F.2d 360, 363 (4th Cir. 1985); *United States* v. *Brandt*, *supra*; *United States* v. *Jarman*, 491 F.2d 764, 766-767 (4th Cir. 1974); *United States* v. *Ireland*, 493 F.2d 1208, 1209 (4th Cir. 1973); and *Rogers* v. *United States*, 367 F.2d 998, 1001 (8th Cir. 1966), cert. denied, 386 U.S. 943 (1967).[5] To be sure, as petitioners stress (Pet. 13-15), the Fifth Circuit, in *United States* v. *Delahoussaye*, 573 F.2d at 912, held that "a minimum form of scienter—the 'should have known' form—is a necessary element of the offense."[6] The decision in *Delahoussaye*, however, neither discussed the cases from other circuits that have reached the opposite conclusion nor addressed the decisions of this Court that have upheld the

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Hearings on H.R. 567 and H.R. 1820 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93d Cong., 1st Sess. 1-2 (1973) (statement of Rep. Dingell).

[5]Several district courts also have held that it is unnecessary under 16 U.S.C. 703 and 50 C.F.R. 20.21(i) for the government to prove that the hunter knew that the field in question was baited. *United States* v. *Atkinson*, 468 F. Supp. 834, 836 (E.D. Wis. 1979); *United States* v. *Ardoin*, 431 F. Supp. 493, 495 (W.D. La. 1977); *United States* v. *Bryson*, 414 F. Supp. 1068, 1073 (D. Del. 1976); *United States* v. *Tarmon*, 227 F. Supp. 480, 482 (D. Md. 1964).

[6]Petitioners also assert (Pet. 13) that the decision of the court of appeals conflicts with the conclusion of the Tenth Circuit in *Allen* v. *Merovka*, 382 F.2d 589, 591 (1967), that 50 C.F.R. 20.21(i) requires proof either that the hunters were involved with the baiting or that it was done for their benefit. The court in *Allen*, however, was concerned with the taking of migratory birds "[b]y the aid of baiting" (50 C.F.R. 20.21(i)) (see 382 F.2d at 590). Petitioners, on the other hand, were charged with taking migratory birds "on or over any baited area." 50 C.F.R. 20.21(i). The two prohibited kinds of conduct are of a different nature and scope. See *United States* v. *Bryson*, 414 F. Supp. 1068, 1072-1074 (D. Del. 1976).

promulgation by Congress of strict liability criminal offenses. In contrast, the courts that have held that scienter is not an element of an offense under 50 C.F.R. 20.21(i) have based their conclusions on an analysis of the purpose behind the Migratory Bird Treaty Act and have found that, since the purpose of the Act is to protect a matter important to the public welfare, the regulation promulgated thereunder is constitutional despite its lack of an intent requirement. See, *e.g.*, *United States* v. *Brandt*, 717 F.2d at 958-959; and *United States* v. *Jarman*, 491 F.2d at 766-767.

We believe that the Fourth, Sixth, and Eighth Circuits are correct. And, despite the disagreement among the circuits, we do not believe that it is necessary for the Court to review this issue at this time. The better course would be to give the Fifth Circuit the opportunity to reexamine its interpretation of 16 U.S.C. 703 and 50 C.F.R. 20.21(i). Should the Fifth Circuit adhere to the view that the statute and regulation contain a minimum scienter requirement, or should another circuit adopt the rationale of *Delahoussaye*, it might well be appropriate to correct a continuing, erroneous view of the Migratory Bird Treaty Act in order to prevent the diminution of the beneficial purposes of the Act. This case, however, does not jeopardize those purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1985

DOJ-1985-03

(3)

SUPREME COURT OF THE UNITED STATES

VIRGIL RAYMOND CATLETT, III, ET AL. *v.*
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 84–1209. Decided April 29, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Petitioners were convicted and fined for hunting doves in a "baited" field contrary to the Federal Migratory Bird Act, 16 U. S. C. § 703, and the regulations issued thereunder, despite their claim that they were unaware of the baiting and that they could not reasonably have been aware of it, since the remaining bait on the property was hidden from view at the time of the hunt.

The Court of Appeals affirmed, observing that petitioners "were apparently unaware of, and had not participated in, the baiting of the field." Nonetheless, the panel applied prior law of the Circuit to hold that scienter is not an element of the crime charged, and thus that petitioners could be convicted even if they could not have reasonably known that the field was baited.

The rule applied is that adopted by several Circuits, reading the regulation in question to impose strict liability on those who hunt over baited fields. See, *e. g.*, *United States* v. *Chandler*, 753 F. 2d 360, 363 (CA4 1985); *United States* v. *Brandt*, 717 F. 2d 955, 958–959 (CA6 1983); *United States* v. *Jarman*, 491 F. 2d 764, 766–767 (CA4 1974); *Rogers* v. *United States*, 367 F. 2d 998, 1001 (CA8 1966), cert. denied, 386 U. S. 943 (1967). Nevertheless, as the Court of Appeals below recognized, the rule applied here is contrary to the holding of a case from another federal Circuit which requires proof of at least the minimum scienter, that hunters should

have known of the baited condition. *United States* v. *Delahoussaye*, 573 F. 2d 910, 912 (CA5 1978).

There is a clear and recognized division between Circuits on the elements of a federal criminal offense. As the court explained in *Delahoussaye*, the regulation at issue here "is a national one, founded on a treaty, and [it] should not mean one thing in one state and another elsewhere." 573 F. 2d, at 913. I would grant certiorari to resolve the split among the Courts of Appeal.